Office-Supreme Court, U.S.
FILED
OCT 4 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 572

THE ALLBRIGHT-NELL COMPANY AND PETER ECKRICH AND SONS, INC.,

Petitioners,

vs.

CARL SCHNELL AND THE GRIFFITH LABORATORIES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GOTTSDIER-HARRIS PRINTING COMPANY, CHICAGO

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STATEMENT.

Respondents, Carl Schnell and The Griffith Laboratories, Inc., oppose the petition for writ of certiorari.

Petitioners have correctly referred to the opinion below. Their statement of jurisdiction is not questioned.

Petitioners raise false issues and have grossly misrepresented facts and holdings of the courts below.

ARGUMENT.

1. Introduction.

The trial court's conclusions of inventiveness of the subject matter claimed by respondents and its unobviousness were arrived at *only after* 19 trial days, including evening and Saturday sessions, wherein some 3,950 pages of testimony and oral argument were recorded, 17 witnesses were examined including 7 specially brought over from West Germany, two movies were shown, numerous charts exhibiting each claim in suit were dissected and analyzed, demonstrations were run, and actual machines of both parties in suit were examined in detail.

It is important to note that proposed findings and post-trial briefs were submitted by both petitioners and respondents *before* the trial court rendered its judgment. That is, the trial court did not render a judgment and then give the winning party a *carte blanche* opportunity to prepare findings.

2. Schnell's Patents Cover Patentable Inventions.

Invention involves a question of fact and the facts are, as found by the courts below, that the sausage industry is based upon the utilization of those portions of carcasses of cattle or hogs which cannot be used for steaks, hams, or chops. (F. 9, D.A. 56.)* Prior to respondent Schnell's invention, grinders and choppers were employed to produce sausage emulsion with the significant drawbacks that many nutritional types of meat trimmings could not be

* The findings of fact will be referred to as "F. ....."; pages of petitioners' Appendix in the court below as "D.A. ....."; petitioners' exhibits as "DX-....."; pages of petitioners' Appendix for this Court immediately following their petition as "D.A. App. ....."

utilized, production was relatively slow and required the employment of skilled sausage makers, the temperature of the product was undesirably high, and the sausage emulsion produced was too stringy. (F. 10-15, D.A. 56-58; F. 26, D.A. 61-62.)

Because of Schnell's unobvious discoveries, many nutritional trimmings, which could not theretofore be used, could be utilized in producing a new and superior sausage emulsion at a tremendous production rate and with great savings to the manufacturer. (F. 16-21, D.A. 58-60; F. 24-26, D.A. 60-62; F. 29, 31-36, D.A. 63-64; F. 42, D.A. 66; F. 65 D.A. 72; F. 200-03, D.A. 129-30; F. 246, D.A. 140.)

As found by the courts below, petitioners, rather than develop their own machine, conspired to copy respondents' machines. They secured respondents' machines and faithfully copied them rather than use the prior art which they praised throughout this litigation. (F. 49-68, D.A. 67-73; F. 250, D.A. 141.)

The detailed annotated findings of the district court considered, *inter alia,* in great detail petitioners' testimony and arguments, discussed all of the claims in suit, found the patents in suit valid and infringed,** and held:

> (1) Respondent Schnell made many new, useful and unobvious discoveries concerning comminuting machines and methods of comminuting meat products. In addition, his new, useful and unobvious inventions of the patents in suit produce new and superior meat products at a lower per pound

**Despite the fact both courts below held the petitioners were released or licensed as to Patent Re. 24,683, petitioners are still contesting the validity of this patent (e.g., pages 3, 5, 27 of petition) in spite of this Court's holdings to the contrary that a licensee cannot deny the validity of the licensor's patent. *United States* v. *Harvey Steel Co.,* 196 U. S. 310, 49 L. Ed. 492 (1905); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.,* 339 U. S. 827, 94 L. Ed. 1312 (1950).

operating cost, displaced space-consuming and more expensive equipment, and revolutionized the sausage industry. (F. 16-37, D.A. 58-65; F. 42-44, D.A. 66; F. 65, D.A. 72; F. 67, D.A. 73; F. 110-15, D.A. 95-97; F. 121, D.A. 101; F. 199-203, D.A. 129-30; F. 246, D.A. 140.)

(2) Respondent did not derive any of his inventions from anyone else. (F. 263, D.A. 144.)

(3) Each of the inventions claimed in any one of the patents in suit is directed to subject matter that is separate and patentably distinct from the subject matter of the claims of the other patents in suit, and none of the claims in any of the patents in suit reads in terms or in substance on any other claim or claims of other patents in suit. (F. 245-48, D.A. 140-41.)

(4) Petitioners deliberately and faithfully copied respondent Schnell's inventions, rather than use the prior art they praised. (F. 28, D.A. 62; F. 49-68, D.A. 67-73; F. 250, D.A. 141.)

(5) The claims in suit cover in terms and substance petitioners' machines and parts and/or their operation. Petitioners' machines do the same work in substantially the same way and accomplished substantially the same results as the machines of patents in suit. (F. 27-29, D.A. 62-63; F. 31, 33, D.A. 63; F. 35, D.A. 64; F. 49-68, D.A. 67-73; F. 108-09, D.A. 94-95; F. 135, D.A. 104; F. 140, D.A. 105; F. 149-50, D.A. 107; F. 156, D.A. 108; F. 163-64, D.A. 110; F. 170-71, D.A. 112; F. 175-76, D.A. 113; F. 180-81, D.A. 114; F. 183-93, D.A. 115-18; F. 195, D.A. 118; F. 251, D.A. 141.)

That the court of appeals carefully examined the record to arrive at its own determination prior to affirming

the lower court decision, is evidenced by its carefully considered eleven-page decision, much of which is devoted to its discussion of the facts based upon the court's own independent review of the record, as where it stated:

> "The defendants further contend, however, that the findings of fact in this case are not so supported and are clearly erroneous.
>
> "The findings of fact in this case are abundantly annotated with references to documentary evidence and testimony of witnesses, making it a comparatively simply matter for this Court to determine that the findings are supported by the evidence and are not 'clearly erroneous.' We are satisfied that the proper standards have been applied by the District Court in holding the patents valid and infringed." (D.A. App. iii.)
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>
> "The District Court had the benefit of two experts' testimony: defendants' witness Clarence T. Fishleigh and plaintiffs' witness Karl E. Schoenherr. *We have also read their testimony.*" (Emphasis added.) (D.A. App. vi.)
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> • • • • •
>
> "*We are satisfied from our study of the record* that grinders and strainers such as the prior art devices, however fine, do not produce a homogeneous emulsion. As plaintiffs point out, the defendants did not merely speed up the grinders which they already had. They built an emulsitator." (Emphasis added.) (D.A. App. ix.)
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> • • • • •
>
> "*We have examined the exhibits with care,* and we agree with the District Judge that it makes no material difference that the knife in the defendants' Emulsitators rotates vertically about a horizontal axis instead of horizontally about a vertical axis as in Schnell. The defendants' Emulsitators do the same work in substantially the same way as the Mince Masters and produce substantially the same results." (Emphasis added.) (D.A. App. ix-x.)
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> • • • • •

> *"We have paid particular attention to the various 'tests' from which the parties draw conflicting conclusions."* (Emphasis added.) (D.A. App. x.)
>
> • • • • •
>
> *"We have devoted detailed study to the assertions of the defendants* that their machines do not infringe the claims in suit, contrary to the precise findings of the District Court." (Emphasis added.) (D.A. App. x.)
>
> • • • • •
>
> *"We have scrutinized all of the defendants' points and authorities,* but find no basis for reversing the determinations of the District Court in Appeal No. 14619, which is affirmed." (Emphasis added.) (D.A. App. xii.)

The main thrust of petitioners' argument appears to be that the courts below applied some "low standard of invention," requiring "only that a combination of old elements be new and useful," and that such a standard is wrong. Petitioners do not show, however, where such a "low standard" of invention was applied by either of the courts below.

The courts below did *not* determine invention based merely on the existence of a new and useful combination of old elements. The trial court found and the court of appeals agreed, following its review of the record, that respondent Schnell's inventions: were not disclosed or suggested in the prior art, considered individually and collectively; included new and unexpected combinations of elements or steps; produced unexpected results; and were not obvious to one skilled in the art. (F. 200-03, D.A. 129-30.)

It should be noted, particularly, that Findings of Fact 202 and 203, state that respondent Schnell "unexpectedly combined" certain elements or steps and the claims of the patents in suit define new and patentable combinations of

functionally cooperating elements or steps, which combinations "would not have been obvious to one skilled in the art," based on knowledge of the asserted prior art patents and publications introduced in evidence by petitioners. Further, Findings 111 (D.A. 95) and 113 (D.A. 96-97) point out petitioners admitted the *unexpected importance* of sealing their comminuting machines to prevent ingress of air and provide a hydraulic column of meat material. See *Powder Power Tool Corp.* v. *Powder Actuated Tool Co.*, 230 F. 2d 409, 415, 416 (7th Cir. 1956).

It is thus clear the district court found Schnell's inventions to be unobvious and applied a standard of invention based on much more than mere novelty and utility, and one that certainly fully meets 35 U. S. C. § 103. Contrary to petitioners' assertions on page 15 of their petition, this case does not place an important question of federal law before this Court.

The court of appeals found the trial court's findings to be proper and supported by the evidence. The court also stated it was satisfied that the proper standards were applied by the lower court in holding the patents valid. Neither of the courts below stated or indicated that mere novelty and usefulness were applied in measuring whether invention existed, and their holdings show otherwise.

Rather than show where or how the courts below applied petitioners' asserted "low standard of invention" based on mere novelty and usefulness, petitioners conveniently ignored the contrary holdings of the courts below.

Petitioners argue, without a stated basis, that a "high" standard of patentability was enunciated by this Court in *Great Atl. & Pac. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U. S. 147, 95 L. Ed. 162 (1950) and followed by the Court of Appeals for the Eighth Circuit in *Graham Plow, Inc.* v. *John Deere Co.*, 333 F. 2d 529 (8th Cir. 1964),

cert. granted, 379 U. S. 956 (Case No. 11), whereas a "low" standard of invention was allegedly followed in the instant suit by the Seventh Circuit.

In the *Graham* case, which is totally inapposite to the instant case, the court of appeals for the Eighth Circuit followed the standard applied by this Court in *Great Atl. & Pac. Tea Co.* v. *Supermarket Equip. Corp., supra,* and stated (333 F. 2d 529, 533-34), that although the trial court found specifically that the patented structure was not obvious, nowhere did the court find any new or significantly different result. If a finding of an "unusual or surprising" result as alluded to on page 14 of petitioners' brief, is requisite in satisfying the "high" standard of patentability advocated by petitioners, then this suit satisfies completely such a requirement.

The district court found that respondent Schnell's inventions involved a new combination of cooperating elements or steps which produced new and startling changes in the industry whereby a superior product was made at a tremendous savings to the manufacturer. (F. 16-21, D.A. 58-60; F. 24-26, D.A. 60-62; F. 29-36, D.A. 63-64; F. 42, D.A. 66; F. 65, D.A. 72; F. 200-03, D.A. 129-30; F. 246, D.A. 140.)

The Seventh Circuit held that these findings were proper and added (DA App. iii):

> ". . . We are satisfied that the proper standards have been applied by the District Court in holding the patents valid and infringed."

The standard of invention applied in the instant suit by the trial court and court of appeals fully embraced the requirements of 35 U. S. C. 103, and the dictates of this Court as set forth in the *Great Atl. & Pac.* case. See also the high standard of invention applied in *Powder Power Tool Corp.* v. *Powder Actuated Tool Co.,* 230 F. 2d 409, 416 (7th Cir. 1956), a decision of the Seventh Circuit which is

referred to in the *Graham* case and applies the standard of invention pronounced in the *Great Atl. & Pac.* case.

As a second argument, petitioners repeatedly allege the court of appeals found that Schnell made "a single 'real discovery.'" (See pages 16 and 26 of the petition.) That is not true. Schnell made many patentable discoveries. (E. 16-24, D.A. 58-60; F. 200-03, D.A. 129-30; F. 246-47, D.A. 140.) The court of appeals, in its own review of the record, found the findings of the trial court to be proper and held valid the separate and distinct inventions claimed in the patents in suit.

Petitioners at the trial relied upon some 34 prior art references in addition to modified garbage disposal devices in alleging invalidity of Schnell's patents. Before the court of appeals, twenty of these references were dropped, and now petitioners are referring only to one reference, *i.e.*, the *Hortnagl* patent.

The Austrian patent to *Hortnagl* (DX-54 and -54A, D.A. 2459) does not teach a meat emulsion can be produced. *Hortnagl* does not teach how to produce such an emulsion. *Hortnagl* does not disclose petitioners' and respondents' valve plate (the rate at which material is fed to a perforate plate and the size and number of holes determine whether all the material goes through the plate on one pass), petitioners' and respondents' tapered knife, and does not mention suction being applied to the perforate plate as exists with petitioners' and respondents' machines. *Hortnagl* does not teach the principles of the Schnell machines. Certainly, if petitioners' wish to use *Hortnagl*, as *Hortnagl* is shown, they are free to do so. They never have done so—or at least they never told the trial court what happened if they did. (F. 241, D.A. 139.)

Moreover, if *Hortnagl* knew anything about a hydraulic column, which is found in petitioners' and respondents'

machines, he certainly told the world to avoid it and, except for Schnell, the world did so.

On page 6 of their petition, petitioners imply respondents' expert testified that adding a seal to *Hortnagl's* device would be apparent. Respondents' expert stated the admission of air into the *Hortnagl* machine definitely affects its operation (D.A. 1201-02). The expert added (D.A. 1156-8) he would seal the *Hortnagl* machine if he wanted to operate it; however, this response was given only *after* he had seen the operation of the sealed machines of respondents and petitioners.

Petitioners attempt to deprecate commercial success on pages 23 and 24 of the petition. The elements supporting satisfaction of a long-felt want and commercial success are pointed out in detail in Findings 25-26 (D.A. 61-62), 29-36 (D.A. 63-64), 43 (D.A. 66), 51, 53-55 (D.A. 68-69), 60 (D.A. 70), 65 (D.A. 72) and 121 (D.A. 101). The court of appeals agreed with the trial court (D.A. App. viii), and added this was only "*another* point supporting validity." (Emphasis added.) As petitioners well know, their assertions on page 24 of their petition relative to some 3500-4000 sausage makers is not accurate. Because the production rate of sausage emulsion is so great with petitioners' and respondents' machines, only the major sausage producing companies—not the small butcher shop operators—can obtain the full benefits of these machines, and that represents a market that can be saturated with a limited number of machines.

Petitioners state flatly that there was only one "real" invention. This is their own statement and is in complete contradiction to the concurrent findings of the courts below.

It is true that many, but not all, of Schnell's discoveries were intended for use with a hydraulic column. Certainly a

great part of the success of the devices depends on the use of the hydraulic column.

The invention of the telephone did not mean that all ways of improving it were unpatentable but this is the very principle petitioners seek to apply, despite the fact the present case is not a situation involving such a fallacious principle.

3. Schnell's Inventions Are Patentably Distinct.

In the courts below, petitioners did not concede infringement of a single claim by any one of their devices. They never conceded the validity of a single claim of any of the seven patents in suit. Petitioners always contended the prior art devices could do everything which Schnell did.

Yet respondents are now accused of seeking a monopoly of all useful sausage emulsifiers! Why not use the devices of some of the more than thirty references they relied on in the trial court, or the fourteen references they relied on before the court of appeals? How can respondents have a monopoly if, as petitioners have argued in the past, the prior art devices are as good as the devices or methods in suit?

It appears to be petitioners' position that although no one was able to solve the many problems of the art until Mr. Schnell came along and, though petitioners deliberately copied Schnell's inventions, counsel for respondents were unable to put into English language a combination of words which would describe petitioners' machines.

Petitioners state erroneously that the decision below ignores completely the rules as to double patenting and that respondents were not entitled to even one patent. The trial court, after having each element of each claim analyzed for it in numerous charts presented by petitioners,

held otherwise as did the court of appeals. (D.A. App. xi-xiii.)

Certainly, many important problems can lead to a group of patents, for once the main problem has been solved, many other problems present themselves, the solutions to which are new, useful and unobvious as well as producing superior results. As the courts below held, the solution by Schnell of one problem brought about the presentation and solution by him of other problems.

The Patent Office, district court and court of appeals, each held there was a significant factual difference in the patents. See *Southern Implement Mfg. Co.* v. *McLemore*, ___ F. 2d ___, 146 U.S.P.Q. 680, 684 (5th Cir. 1965). Petitioners, who were found to be deliberate pirates of the inventions, rely merely on their own say-so to contradict these holdings. Even though there were 272 detailed annotated findings by the District Court, petitioners have failed to cite a single one which was not properly supported.

The patents in suit are directed to the separate and patentably distinct subject matter as briefly discussed below.

Patent 2,840,318 concerns comminuting apparatus having a sloping recirculating wall above or in advance of the knife. (F. 172, D.A. 113.)

Re. Patent 24,683 (Reissue of Patent 2,836,825) covers *methods* of emulsifying meat material for sausage products. (F. 136, D.A. 104.)

Re. Patent 24,764 (Reissue of Patent 2,842,177) concerns comminuting machines having specific lug structure. (F. 177, D.A. 114.)

Patent 2,906,310 concerns emulsifiers that are sealed (drive means for rotary knife is "sealed") during operation to prevent ingress of air and provide a hydraulic column. Certain of the claims recite structure that provides for adjustment of the knife relative to the perforate plate. (F. 122, D.A. 101.)

Patent 2,934,120 concerns details of a high speed tapered knife. (F. 151, D.A. 107.)

Patent 2,934,121 concerns certain very specific details of a particular knife *and* comminuting apparatus having such a knife. (F. 157, D.A. 108.)

Patent 3,044,514 covers emulsifiers having structure that provides an air-sealing head or hydraulic column and, in addition, concerns the cooperative relationship of such structure with other specifically defined structure of the emulsifiers. This patent also relates elements of the emulsifier to recirculation. (F. 141, D.A. 105.)

The Patent Office, district court and court of appeals, each held there was no double patenting, and properly so.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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Respondents' overall objection to the Petition appears to be that it does not include a detailed argument as to the merits of the Schnell patents. Obviously, the merits, in the present posture of the case, are not before this Court.

The thrust of the Petition in this case is:

(1) That there exists a conflict of decision between the several Courts of Appeals as to the proper standard of invention. This, Respondents do not deny.

(2) That the Court of Appeals for the Seventh Circuit has shown an increasing tendency, culminating in this case, to apply an improper and low standard of invention. This, Respondents do not categorically deny but, instead, assert

that the Schnell patents would have been held valid even if a proper standard of invention had been applied.

(3) That the standard of invention applied by the court below, when coupled with the failure of the Court of Appeals to invoke the prohibition against double patenting, has resulted in a 21-year monopoly in Respondents with respect to a single comminuting machine. This, Respondents attempt to bypass with the assertion that prior art comminuting machines are available to the public (Respondents' brief p. 11) and by meager reference to the subject matter of the seven patents (Respondents' brief pp. 12 to 13).

(4) That the possibility of further litigation in other circuits is virtually nil. This, Respondents do not deny.

Pages 2 to 11 of Respondents' brief loosely paraphrase some of the findings of the district court, present selected out-of-context quotations from the decision of the Court of Appeals and reiterate Respondents' arguments in the courts below as to the commercial success of Schnell's comminuting machine in the sausage industry when employed further to comminute a previously comminuted sausage emulsion.

The *Powder Power Tool Corp.* case, cited at page seven of Respondents' brief, was decided in 1956 by a panel of judges of whom only Judge Duffy, who did not participate in the case below, is still active, and it reflects the standard of invention from which the Seventh Circuit has steadily retreated, as recognized by Judge Graven and as shown by that court's record over the past five years in patent cases involving combination claims (Petition p. 21). While the court below did not expressly articulate the standard applied in the present case, it relied only on cases decided prior to or within a few days of the *A & P* case. Certainly, there is nothing in the decision below to indicate that the

Court of Appeals applied anything other than the low standard to which it has recently subscribed, as recognized by Judge Graven.

Pages 8 to 11 of Respondents' brief are devoted primarily to an argument that even if the Court of Appeals in this case had applied the standard of invention enunciated by this Court in the *A & P* case, the Schnell patents would still have been held valid. But this "iffy" speculation as to what the result might have been under a proper standard of invention, is not before this Court. Rather, the question is whether the Court of Appeals did, in fact, apply the proper standard of invention.

Respondents' arguments concerning the "result" achieved by the Schnell machine (Respondents' brief, p. 8) are related solely to the alleged commercial success of the Schnell machine in the sausage industry. If applicable at all, this "result" applies only to the use of a seal on the Schnell machine because initially the same machine without a seal was "unsatisfactory" as the courts below found.

Neither Respondents nor either court below have pointed to any "unusual or surprising results" flowing from the sloping of the wall as claimed in patent No. 2,840,318; the use of prior art lugs as claimed in patent No. Re. 24,764; the tapering of the knife as claimed in patent No. 2,934,120; the other knife "details" as claimed in patent No. 2,934,121; or the adjustability of the knife as claimed in patent No. 2,906,310. The argument (Respondents' brief, p. 12) that these patents can be sustained because they solved problems presented by the hydraulic column and seal entirely overlooks the fact that the features covered by these patents were included in the early "unsatisfactory" Schnell machine that did not include a column or a seal.

The attempt by Respondents to minimize the reliance of the Court of Appeals on Schnell's alleged commercial success (Respondents' brief p. 10) hardly squares with their reliance below on such alleged success or with the arguments presented at pages 2 and 3 of their brief in this Court. Respondents' reference to what "Petitioners well know" (Respondents' brief p. 10) is both inaccurate and completely outside the record.

Respondents' attempt to disclaim the 21-year monopoly afforded to them by the decisions below (Respondents' brief pp. 11 and 12), by asserting that they do not have a monopoly of "all useful sausage emulsifiers", misstates the scope of the "monopoly" and completely begs the question. Respondents, under the decisions below, will enjoy a 21-year monopoly on the type of comminuter shown in the Schnell patents. Moreover, Respondents' own description of the "subject matter" of the seven patents in suit emphasizes the fact that the patents are all directed to the same comminuting machine differing only in the specificity with which certain non-inventive details of the various elements are recited in the patent claims.

CONCLUSION.

It is respectfully submitted that the reasons for granting the Writ of Certiorari are sufficient to justify review by this Court and that the Petition for Certiorari should be granted.

Since the case involves the validity of seven patents and 82 claims, it affords the Court a unique opportunity to settle, in one decision a number of unresolved questions as to the proper standard of invention under 35 U. S. C. 103. The large number of patents involved will permit this Court to provide guidance for the patent bar, the Patent Office and inventors in a manner which probably cannot be achieved in any of the other cases now pending before this Court.

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